UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CONCEPT SOFTWARE & SERVICES INC, SAMPATH KUMAR BHASKARACHAR NANJUNDACHARI,	)	**Case No.**
Plaintiff-petitioner,	)	**COMPLAINT**
vs.	)	
WILLIAM P. BARR, Attorney General of the United States, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, D.C. 20530; KEVIN MCALEENAN, Secretary, Department of Homeland Security, 425 I Street, Washington, D.C. 20536; KENNETH CUCCINELLI, Director, U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue, NW, Washington, DC 20529, KATHY BARAN, Director, California Service Center, U.S. Citizenship and Immigration Services, 24000 Avila Road, Laguna Niguel, California 92677.	)	
Defendants-respondents.		

COMPLAINT

I. INTRODUCTION

1. This is an action brought pursuant to Section 10b of the Administrative Procedure Act, 5 U.S.C. § 702, et. Seq., seeking to hold unlawful and set aside the decision of the California Service Center (CSC) Director of the United States Citizenship and Immigration Services (USCIS) in File No. WAC1903750584 on May 27, 2019, denying Concept Software & Services Inc.'s (Concept Software)'s Form I-129, Petition for Nonimmigrant Worker on behalf of Sampath Kumar Bhaskarachar Nanjundachari on USCIS' legally erroneous conclusion that Plaintiff's failed to establish an employer-employee relationship and that the job of QA Test Engineer offered to him is not a specialty occupation despite the fact that it is undisputed that most QA test engineers have a bachelor's degree in a computer-related field, and both the courts and USCIS itself have repeatedly held that where most persons in an occupation require a bachelor's degree in a narrow range of majors, or a related major, or its equivalent, it is a specialty occupation.

2. This action also asks the Court to hold unlawful and set aside the Director's denial of Mr. Bhaskarachar's application to extend his nonimmigrant status in the United States (same date and file number as above), which was denied solely because of the erroneous denial of Concept Software's petition on his behalf.

II. PLAINTIFF

3. Sampath Kumar Bhaskarachar Nanjundachari is a native and citizen of India who holds the U.S. equivalent of a Bachelor of Engineering degree in Computer Science and Engineering from VTU University in India. Mr. Bhaskarachar earned a single foreign degree that is fully equivalent to a four-year U.S. Bachelor's degree in Computer Science and Engineering from a regionally accredited college or university in the United States.

4. Concept Software is a software and engineering solutions company that provides value-added solutions and services to Fortune 5000 companies and government agencies and petitioned for Mr. Bhaskatrachar's H-1B status.

III. DEFENDANTS

5. Defendant, William P. Barr, is sued in his official capacity as the United States Attorney General. As Attorney General, Mr. Barr is responsible for the administration and enforcement of the immigration laws of the United States.

6. Defendant, Kevin McAleenan, is sued in his official capacity as Secretary of Department of Homeland Security ("DHS"). As Secretary of DHS, Mr. McAleenan is responsible for the administration and enforcement of the immigration laws of the United States.

7. Defendant, Kenneth Cuccinelli, is sued in his official capacity as Director of the United States Citizenship and Immigration Services ("USCIS"). As Director of USCIS, Mr. Cuccinelli is responsible for the overall administration of USCIS and the implementation of the immigration laws of the United States.

8. Defendant, Kathy Baran, is sued in her official capacity as Director of the USCIS California Service Center. As Director of the California Service Center, Ms. Baran is responsible for the overall administration of the USCIS California Service Center and the decisions that are issued.

IV. JURISDICTION AND VENUE

9. This action arises under the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1101. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question) and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*.

10. The Court also has jurisdiction over this matter pursuant to 28 U.S.C. § 1331. *See Califano v. Sanders*, 430 U.S. 99, 105 (1977) (except where statutes preclude review, 28 U.S.C. § 1331 "confer[s] jurisdiction on federal courts to review agency action"). See also, 5 U.S.C. § 702; 28 U.S.C. § 1361; 28 U.S.C. §§ 2201-2202.

11. Because Defendants' decision on a petition for H-1B visa status is not

discretionary, neither the immigration laws (see, e.g., 8 U.S.C. § 1252(a)(2)(B)(ii)) nor the Administrative Procedures Act, 5 U.S.C. § 701 *et seq* (the "APA") withdraws jurisdiction. *See, e.g., Spencer Enterprises, Inc. et al v. United States*, 345 F.3d 683 (9th Cir. 2003).

12. Venue is proper in the District of Columbia under 28 U.S.C. § 1391(e) because Defendants reside in this judicial district.

V. STANDING

13. (1) Mr. Bhaskarachar likewise has a legally protected interest in a decision by the USCIS on Concept Software's petition on his behalf which is not arbitrary and capricious, nor an abuse of discretion, and which is in accordance with law, per 5 U.S.C. 9 706(2), and this right has been invaded inasmuch as because of the improper denial of this petition his change of status has also been denied. The invasion of this right has caused him concrete and particularized injury in that as a result of this invasion he cannot commence employment with Concept Software and so cannot derive the revenue he anticipated from this employment; (2) there is a causal connection between the injury-in-fact and the Defendants' challenged behavior in that it is precisely the Defendants' denial of Concept Software's petition and the application for change of status which prevents Mr. Bhaskarachar from working for Concept Software and (3) it is certain that the injury-in-fact will be redressed by a favorable ruling in that such

a ruling will enable Concept Software to employ Mr. Bhaskarachar and so enable him to support himself. Further, Concept Software wishes to employ Mr. Bhaskarachar in the offered position for several reasons – Concept Software believes that Mr. Bhaskarachar has a wealth of experience in software quality assurance and testing in different environments and platforms, such that major future projects will be interrupted without Mr. Bhaskarachar's employment, resulting in major loss of time and capital. Accordingly, Mr. Bhaskarachar and Concept Software have standing to complain of this action. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (U.S. 1992), *supra.*

VI. FACTUAL BACKGROUND

14. On November 7, 2018, Concept Software submitted the instant H-1B Petition on behalf of Mr. Bhaskarachar with USCIS seeking to classify him as a temporary worker in a specialty occupation (H-1B) under Section 101(a)(15)(H(i)(b) of the INA with a concurrent request for change of employer and extension of status. A complete copy of that Petition with all evidence filed with it is attached as Exhibit A.

15. According to the terms of the Petition, Concept Software sought Mr. Bhaskarachar's services as a QA Test Engineer. In connection with his role as QA Test Engineer, Mr. Bhaskarachar would for a temporary period perform the

following sampling of job duties:

- Responsible for planning, designing and evaluating the testing approach, test plan, test strategy, test procedures and testing estimates
- Create and execute HYBRID Automation Selenium Framework on Cloud Devices, provide feedback/setup complex test data in ORACLE/SQL databases
- Responsible for providing input to determine the Test Cycle schedules and milestones
- Prepare a Framework for running test cases on iOS and Android devices using Object Oriented Programming Languages C/C++/Java
- Run automation test suite Regression/Integration/Smoke testing using cloud hosted SEETEST devices and web browsers using SAUCE LABS
- Perform internal QA review of Test Execution Plan and timely notification of the Test execution results to client
- Responsible for QA POS lab setup and perform complex integration (backend and frontend) testing in QA lab

See Exhibit A.

16. Subsequently, the USCIS sent Concept Software a Request for Evidence ("RFE") dated February 15, 2019, and Concept Software timely responded to the RFE on March 30, 2018. See Exhibit B, Copy of RFE; Exhibit C, Copy of Response Cover Letter. Concept Software dutifully responded to the RFE and addressed two separate issues, both of which formed the basis for denial – evidence of a valid employer-employee relationship, and evidence pertaining to the proffered position as a specialty occupation. In response, Concept Software offered the following explanations:

- Concept Software is an employer and not an agent because Concept software has the right of ultimate control over its employees while performing services for its clients. Concept Software is responsible for all compensation, taxes, and other benefits due to its employees and it timely pays all applicable taxes. The company's business model is no different from any other IT consulting and/or software development services firm including large ones such as IBM or Accenture which hire employees to provide specialty occupation services in the areas of computer programming services, IT, finance, or ERP consulting. Exhibit C.

- According to the Occupational Outlook handbook, the Specialty Occupation of 'Computer Occupations, All Other' requires a minimum of a bachelor's degree as an entry level education. See Exhibit C. The criteria of Baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position; the criteria of the degree requirement being common to the industry in parallel positions among similar organizations; and the criteria that the employer normally requires a Baccalaureate degree or its equivalent for the position have all been met. Id.

In Raj and Co. v. USCIS, 85 F. Supp 3d 1241 (2015), the court notes the fallacy in the USCIS interpretation of the OOH provided in the instant Request for Evidence that "Defendant's approach impermissibly narrows the plain language of the statute. The first regulatory criterion does not restrict qualifying occupations to those for which there exists a single, specifically tailored and titled degree program".

17. Nevertheless, on May 27, 2019 USCIS, acting through Kathy A. Baran, Director of its California Service Center, issued its Decision denying Concept Software's H-1B Petition on behalf of Mr. Bhaskarachar. See Exhibit D, Copy

of Decision.

18. The stated basis for the Decision was Concept Software did not establish an employer/employee relationship and failed to meet one of the four criteria for a specialty occupation. Id.

19. On the same date USCIS denied Mr. Bhaskarachar's application for extension of status because Concept Software's petition on his behalf was also denied. Id.

VII. CAUSE OF ACTION

20. 5 U.S.C. § 706 provides in material part that:

> To the extent necessary to issue a decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

21. The USCIS' Decision of May 27, 2019 denying Concept Software's H-1B petition on behalf of Mr. Bhaskarachar was arbitrary, capricious and not in accordance with law inasmuch as:

(b) The conclusions that Concept Software had "not shown that the proffered position is a specialty occupation" and that "you have not met the employer-

employee relationship test" was likewise arbitrary and capricious inasmuch as it was unsupported by substantial (or in fact any) evidence as well as not in accordance with law inasmuch as it is inconsistent with USCIS Regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) as interpreted in *Next Generation Tech., Inc. v. Johnson*, No. 15 cv 5663 (DF), 2017 U.S. Dist. LEXIS 165531, at *30-31 (S.D.N.Y. Sep. 21, 2017) and at least 2,415 decisions of the USCIS, all of which stand for the proposition that an occupation is a "specialty occupation" if "most" of the members of that occupation hold a degree in a specialized field or related field, and it is undisputed that most industrial engineers do hold such degrees.

22. Further, inasmuch as Mr. Bhaskarachar's application for an extension of status was denied solely because Concept Software's petition on his behalf was denied, the denial of that extension of status was arbitrary and capricious and not in accordance with law as well.

23. 8 CFR 214.2(h)(h)(ii) defines the term "United States employer" as follows:

> (1) Engages a person to work within the United States;
>
> (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employer; and
> (3) Has an Internal Revenue Service Tax Identification Number.

24. Concept Software satisfied all of the criteria to establish a proper employer-employee relationship in the initial petition and by providing additional evidence of the following – a detailed itinerary, master service agreement, vendor letter, sub-vendor letter, and end-client letter, signed employment agreement timesheets, pay stubs, and an organizational chart for Concept Software.

25. 8 CFR 214.2(h)(4)(iii)(A) provides in relevant part that:

> Criteria for H-1B petitions involving a specialty occupation – (A) Standards for specialty occupation position. To qualify as a specialty occupation, the position must meet one of the following criteria:
>
> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;....

26. The Decision indicates that:

> "The record does not contain evidence of a U.S. Bachelor's degree or higher required by the specialty occupation from an accredited college or university", or "...an evaluations of the beneficiary's foreign education to show that the beneficiary's foreign education is equivalent to a U.S. bachelor's degree or higher. Exhibit D.

27. However, Concept Software provided a credentials evaluation from Silvergate in the initial Petition filing and included the evaluation again in the response to the Request for Evidence. Exhibit C.

28. If QA Test Engineers need a bachelor's degree typically in computer science

and engineering and "many" QA Test Engineers have a bachelor's degree in a related computer science and engineering field, then it follows that this qualification is "normally" required for this position and so the job qualifies as a specially occupation. *See Next Generation Tech., Inc. v. Johnson*, No. 15 cv 5663 (DF), 2017 U.S. Dist. LEXIS 165531, at *30-31 (S.D.N.Y. Sep. 29, 2017).

29. This reasoning is consistent with that of the USCIS' Administrative Appeals Office, which has stated in at least 131 different unpublished decisions, that "USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations."[1] E.g. (Identifying Information Redacted By Agency) 2012 WL 4713226 (AAO February 8, 2012). However, the OOH provides that "[m]ost accountant and auditor positions require at least a bachelor's degree in accounting or a related field." (emphasis added). The OOH also states that "[m]ost computer and information research scientists need a Ph.D. in computer science or a related subject, such as computer engineering." (emphasis added).

30. As these cases also illustrate, "[i]n general, provided the specialties are

[1] Extracted from Lexis' library of unpublished AAO and BIA decisions to retrieve 131 decision containing this paragraph. See Exhibit E. The first of these decisions is attached as Exhibit F.

closely related, e.g., statistics and math, a minimum of a bachelor's degree or higher degree in more than one specialty is recognized as satisfying the 'degree in the specific specialty' requirement of Section 214(i)(1)(8) of the Act. In such a case, the required 'body of highly specialized knowledge' would essentially be the same". *Matter of (Name Redacted)*, (AAO March 12, 2017). [2]

31. Further, at least two published decisions of the Immigration and Naturalization Service have held that occupations which required at least a bachelor's degree in a certain subject, or a related field, qualify as a member of the professions. *Matter of Doultsinos*, 12 I&N Dec. (DD 1967), *Matter of Rabbani*, 12 I&N Dec. 15 (DD 1966).

32. These decisions are binding upon all Service employees in the administration of the Immigration and Nationality Act. 8 C.F.R. § 103.3(c).

33. "The clearest common denominator for professional standing is at least a baccalaureate degree awarded for academic study in a specific discipline or narrow range of disciplines. This requirement is explained in numerous Immigration and Naturalization Service precedent decisions

[2] Available online at https://www.uscis.gov/sites/default/files/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20%28H-1B%29/Decisions_Issued_in_2017/MAR212017_01D2101.pdf

dating back to 1966. E.g., *Matter of Portugues Do Atlantico Information Bureau, Inc.*, Interim Decision 2982 (Comm.1984); *Matter of Ahmed*, 12 I & N Dec. 498 (R.C.1967); *Matter of Palanky*, 12 I & N Dec. 66 (R.C.1966); *Matter of Shin*, 11 I & N Dec. 686 (D.D. 1966)." *Matter of Caron International, Inc.*, 19 I. & N. Dec. 791, 793 (AAO 1988).

34. The USCIS has interpreted the term "specialty occupation" in the INA to be "nothing more than a carry-over" from the pre-1990 Act term, "member of the professions", *Memorandum of Jacquelyn Bednarz*, August 26, 1993, reprinted in 70 No. 41 Interpreter Releases 1411.[3] *See also* (Identifying Information Redacted by Agency), 2012 WL 4713221 nt4 (AAO, February 7, 2012).

35. The requirement that the degree must be in a specific academic major or have a specific title has been explicitly rejected by at least two United States District Courts and affirmed by none. The California Service Center denied an H-1B petition for a Market Research Analyst, finding that the OOH "...does not indicate that the degrees held by such workers must be in a specific specialty that is directly related to market research...." *In Re: Residential Finance Corporation*, WAC1121555179 (CSC, November 11, 2011). In reversing the CSC and directing approval of the petition, the court said this:

[3] Exhibit G

> Defendant argues that Plaintiff is attempting to read out of the statutory and regulation requirements the "specific specialty" component. But Defendant's approach is too narrow....Defendants implicit premise that the title of a field of study controls ignores the realities of the statutory language involved and the obvious intent behind them. The knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge. *See Tapis Int'l v. I.N.S.*, 94 F. Supp. 2d 172, 175-176 (D. Mass. 2000) (rejecting agency interpretation because it would preclude any position from satisfying the "specialty occupation" requirements where a specific degree is not available in that field). *Residential Fin. Corp. v. United States Citizenship and Immigration Servs.*, 839 F. Supp. 2d 985, 996 (S.D. Ohio 2012).

36. Therefore, the "body of highly specialized knowledge" which must be applied theoretically and practically in the performance of the duties of the occupation must by necessity be directly related to the duties of the occupation, that is, "the specific specialty". The source of that knowledge, however, may originate in different fields or disciplines, or a combination of fields or disciplines, including those in a "related field". Whatever the field named in the degree, the inquiry must go to the substance of the knowledge learned, the attainment of which is usually memorialized by the conferral of a degree.

37. Accordingly, inasmuch as the OOH, which the USCIS itself treats as an authoritative source, finds that "Computer Occupations, All Other" and many QA Test Engineers have a bachelor's degree in a computer science related field;

therefore the USCIS did not act in accordance with law in finding it not to be a specialty occupation.

38. 5 U.S.C. § 706(2) provides that a court may "hold unlawful and set aside agency action, findings, and conclusions found to be---

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court hold unlawful and set aside the decisions denying Concept Software's petition for nonimmigrant worker on Mr. Bhaskarachar's behalf and his application to extend his status on the grounds that they were both arbitrary and capricious and not in accordance with law.

RESPECTFULLY SUBMITTED this 5th day of August, 2019.

KUCK BAXTER IMMIGRATION LLC,

/s/ Charles H. Kuck
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CERTIFICATE OF SERVICE

This is to certify that on this 5th day of August, 2019, the foregoing **COMPLAINT** and its accompanying Exhibits were served by First Class Mail, postage pre-paid, on:

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